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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BALCOR FILM INVESTORS, et al.,

Petitioners,

vs.

ROBERT ECKSTEIN and SYLVIA ECKSTEIN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Was the Seventh Circuit correct that its choice of law rules permitted the application of the statute of limitations in the Central District of California to actions for violations of section 10(b) to *Eckstein v. Balcor Film Investors*, an action transferred from the Central District of California to the Eastern District of Wisconsin?

2. Was the Seventh Circuit correct in following its own decision in *McCool v. Strata Oil Co.*, 972 F.2d 1452 (7th Cir. 1992) in holding the principles of retroactivity in the Seventh Circuit as of June 19, 1991 permitted choice of forum to constitute "reliance" on a prior limitations period?

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REASONS FOR DENYING THE WRIT

Summary

The Seventh Circuit decision[1] of which review is sought deals solely with the law "in [that] jurisdiction" -- *i.e.*, Seventh Circuit law as of June 19, 1991, relating to §10(b) limitations periods, choice of law and retroactivity. The questions at issue are esoteric and unlikely to recur. Moreover, the answers to these questions are not dispositive of the instant controversy.

No intolerable conflict exists between *Balcor* and *Menowitz v. Brown*, 991 F.2d 36 (2d Cir. 1993). Each court applied the law of its Circuit -- the law of the transferee court -- as "the jurisdiction" under §27A, to determine the applicable statute of limitations. Each court, the Seventh Circuit in *Balcor* and the Second Circuit in *Menowitz*, applied its choice of law rules to guide its determination. Any "conflict" is in the result only and therefore is tolerable because it arises only due to the differing choice of law rules in those circuits. Furthermore, there are both legal and factual distinctions between the *Balcor* and *Menowitz* opinions which render any "conflict" unimportant and unworthy of Supreme Court review.

With regard to the *Eckstein* action[2], Seventh Circuit

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[1] *Robert Eckstein, et al. v. Balcor Film Investors, et al.*, Fed. Sec. L. Rep. [Current] (CCH) ¶97,712 (7th Cir. Aug. 20, 1993) ("*Balcor*").

[2] There are two related cases to which the petition addressed itself: *Robert Eckstein and Sylvia Eckstein v. Balcor Film Investors, et al.* (the "*Eckstein* action") and *Majeski v. Balcor Film Investors, et al.* (the "*Majeski* action").

choice of laws rules directed the court to *Van Dusen v. Barrack*, 376 U.S. 612 (1984) and *Ferens v. John Deere Co.*, 494 U.S. 576, 110 S. Ct. 1274 (1990). The court then applied *Van Dusen* and *Ferens* to reach the conclusion that the transferor forum supplied the statute of limitations. Neither the holding in *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151 (1983) nor *In re Korean Air Disaster of September 1, 1983*, 829 F.2d 1171 (D.C. Cir. 1987) precludes the application of the *Van Dusen* and *Ferens* principles.

The sole question in the *Majeski* action is whether the Seventh Circuit properly followed its own law relating to its well-established test for retroactivity, which *Majeski* clearly satisfies. The *Majeski* action being timely, the litigation against the Petitioners will continue. Moreover, even without a §10(b) claim, the same underlying facts would be tried in one forum or another under *Majeski's* breach of fiduciary duty claim.

All issues in these cases cannot be resolved by the grant of the petition because the Seventh Circuit remanded both cases. Thus, no final resolution of the issues will result from this Court's review.

This Court should deny review of the matters presented in the petition.

I.
THE SEVENTH CIRCUIT'S DECISION IN THE *ECKSTEIN* ACTION IS NOT APPROPRIATE FOR REVIEW

A. The Seventh Circuit Applied Its Own Choice of Law Rules

In its decision (App. 8), the Seventh Circuit pointed out that §27A recognizes a "non-uniform" practice of determining the appropriate statute of limitations in a §10(b) case. It characterized §27A by stating: "[s]ection 27A recognizes that different circuits had taken different approaches to the appropriate statute of limitations in suits under §10(b), and it codifies this fractured nature of federal law for cases filed before June 20, 1991." App. 8. The Seventh Circuit thus looked to its own law prior to *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, _ U.S. _, 111 S. Ct. 2773, 115 L.Ed.2d 321 (1991) to determine the proper statute of limitations to apply to the *Eckstein* action. Specifically, it looked to its choice of law principles and analogized the situation to one where the laws of two states presented two different limitations period. App. 7-9.

Contrary to the Petitioners' portrayal, the Seventh Circuit did not state that: "[s]ection 27A requires a transferee court to apply the law of the transferor forum." Rather, the court stated: "The district in which the court that decides the case sits must be 'the jurisdiction' for purposes of §27A", as *Menowitz* stated.

Menowitz, in deciding under §27A whether its pre-*Lampf* limitations period[3] could be applied to a §1407 transferred case, considered "whether Second Circuit doctrine directs application of the Eleventh Circuit limitations rule to such a transferred claim." Each circuit court looked to its own doctrine as of June 19, 1991, to determine the appropriate limitations period "provided by the laws applicable in [its] jurisdiction," pursuant to §27A. Thus, there is no intolerable conflict between *Balcor* and *Menowitz*.

B. The Seventh Circuit Choice of Law Rules Directed the Court to *Van Dusen* and *Ferens*

The *Eckstein* action was initially commenced on February 10, 1989 in the United States District Court for the Central District of California. At that time, the statute of limitations applicable to §10(b) actions in both the Central District of California and the Eastern District of Wisconsin was three (3) years from discovery. Indeed, it was not until one and one-half years of active litigation (and one year after the transfer of the *Eckstein* action) that the Seventh Circuit announced a new statute of limitations in *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 2887 (1991). Thus, the potential effect of the transfer of *Eckstein* -- more than a mere change of location -- did not arise until long after the transfer had been ordered.[4]

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[3] *Ceres Partners v. GEL Assoc.*, 918 F.2d 349 (2d Cir. 1990).

[4] On the other hand, the *Menowitz* court addressed the issue of which statute of limitations applied to an action commenced and transferred to a district court in the Second Circuit *after* the Second Circuit adopted its new statute of limitations in *Ceres*.

In deciding which statute of limitations to apply to the *Eckstein* action, the court looked to the law of the Seventh Circuit, including its choice of law rules. Those rules direct the application of *Van Dusen* and *Ferens*.

This Court held in *Van Dusen* and again in *Ferens* that a transfer of venue from one district court to a district court within another circuit

> should be regarded as a federal judicial housekeeping measure, *dealing with the placement of litigation in the federal courts* and generally intended, on the basis of convenience and fairness, *simply to authorize a change of courtrooms*.

Van Dusen, 376 U.S. at 636-37 (emphasis added); *see also, Ferens*, 110 S. Ct. at 1279, 1281.

Petitioners rely heavily upon *DelCostello* and *Korean Air*, claiming that those cases eroded *Van Dusen*. However, Petitioners ignore that this Court, in *Ferens* (decided after both *DelCostello* and *Korean Air*), reaffirmed the principles of *Van Dusen*.

DelCostello fails to offer support for Petitioners' conclusion that the Seventh Circuit erred. *DelCostello* stated: "that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere." *Id.* at 171. The footnote upon which Petitioners rely goes further than the mere snippet they provide to this Court; it states:

> Since *Erie*, no decision of this Court has held or suggested that the Act requires borrowing

> state law to fill gaps in federal substantive statutes. *Of course, we have continued since Erie to apply state limitations periods to many federal causes of action....*
>
> * * *
>
> We do not suggest that the *Erie* doctrine is wholly irrelevant to all federal causes of action. On the contrary, *where Congress directly or impliedly directs the courts to look to state law to fill in details of federal law, Erie will ordinarily provide the framework for doing so.* (citations omitted) (emphasis added).

DelCostello, 462 U.S. at 159-161 n.13. Therefore, it is inaccurate to suggest that *DelCostello* abrogated *Van Dusen*.

Notably, in *DelCostello*, this Court was not confronted with circumstances presented in *Van Dusen*, in *Ferens* or here. However, this Court, both before *DelCostello* (in *Van Dusen*) and after *DelCostello* (in *Ferens*), recognized the likelihood of the *Balcor* issue arising (relating to the *Eckstein* action) when it declared:

> The possibilities suggested by the plaintiffs' argument illustrate the difficulties that would arise if a change of venue, granted at the motion of a defendant, were to result in a change of law.... *[I]n other cases the transferee forum might have a shorter statute of limitations....* In such cases a defendant's motion to transfer could be tantamount to a motion to dismiss.

Van Dusen, 376 U.S. at 629-30 (emphasis added). *See also, Ferens*, 110 S. Ct. at 1281. *Accord*: Marcus, *Conflicts Among Circuits and Transfers Within The Federal Jurisdiction System*, 93 Yale L. J. 677, 708-09 (1984).

Petitioners also erroneously contend that *Korean Air* mandates the rejection of *Van Dusen* as the applicable standard in the circumstances presented in *Eckstein*. Petitioners misunderstand both the nature of the *Korean Air* decision and the concept of a "federal question" for purposes of determining which statute of limitations applies to *Eckstein*, the Ninth Circuit (as the transferor court) or the Seventh Circuit (as the transferee court).

In *Korean Air*, the court was concerned with the consolidation of litigation commenced in five different district courts, representing four different circuits, arising out of a disaster occurring over international waters. The court addressed the quagmire presented by the possible application of multiple interpretations of the law under which the actions were commenced, the Warsaw Convention and the Montreal Agreement. *Korean Air*, 829 F.2d at 1174. Given that these international agreements have the force of federal statutes in the United States and that the matter involved no state laws, the *Korean Air* court concluded that because there would be one interpretation of those agreements, it could, as well as any other court, determine the issues. *Id.* at 1175-76.

The circumstances of *Korean Air* cannot, however, be analogized to §10(b) statute of limitations issues in the era preceding *Lampf* when no "unitary federal law" existed. In pre-*Lampf* securities litigation, most federal district courts looked to the state cause of action most analogous to §10(b) and borrowed its statute of limitations, *Lampf*, 111 S. Ct. at 2785-86, to assess the timeliness of the action.

The issue before the District Court, and again before the Seventh Circuit, was not the interpretation of a federal statute. Rather, it was confronted with determining the proper statute of limitations by which to evaluate the timeliness of the *Eckstein* action. Pursuant to Seventh Circuit choice of law rules, this Court's decisions in *Van Dusen* and *Ferens* require the District Court to apply the statute of limitations applicable in the transferor court. Thus, this Court should not review the Seventh Circuit's application of *its* choice of law rules.

C. The Seventh Circuit Discussion Of Section 27A Does Not Merit Review By The Court

The issue, if any exists, regarding the interpretation of §27A, is of limited import since the statute was enacted as a stop gap measure of limited duration. The number of cases still pending to which the interpretation of §27A may apply is limited. The circumstances present in *Eckstein*, a pre-*Lampf* case commenced in one jurisdiction and transferred to another, further narrow the field of cases on which the resolution of such an "issue" would have an effect. Indeed, it would relate only to: (a) §10(b) cases which (b) were commenced on or before June 19, 1991, where (c) there is a difference in two limitations periods.

Therefore, the review of the Seventh Circuit opinion as to §27A will have a limited effect on a circumscribed group of §10(b) cases, those filed on or before June 19, 1991 and transferred from one court to another. Therefore, there is no need for this Court to determine the "interplay" between §27A and §1404(a), as Petitioners claim.

II.
THE SEVENTH CIRCUIT'S DECISION IN THE *MAJESKI* ACTION IS NOT APPROPRIATE FOR REVIEW

The petition's challenge to *Balcor* as it relates to the *Majeski* action is limited to one paragraph. Petition at 14. There, the Petitioners question whether the reliance (on the earlier limitations period) proffered by the *Majeski* plaintiffs (choice of forum) was sufficient under Seventh Circuit law ("including principles of retroactivity") as of June 19, 1991.

The Petitioners argued in the court below that "reliance" on an earlier limitations period must consist in postponement of the filing of the action in the belief that the longer (earlier) limitations period was available. This argument is repeated by Petitioners here (Petition at 14), asserting it is "obvious" a choice of forum cannot suffice as reliance because "it does not represent any detrimental change of position as to the timing of the lawsuit." *Id.*

That is incorrect. In this context, the Petitioners' when-versus-where argument is a distinction without a difference: "where" determines how much time a litigant has (the limitations period for filing the action); "when" determines how much time a litigant takes. Either question satisfies the Petitioner's artificial requirement that "reliance" must relate to timing. The Seventh Circuit's *McCool* decision had already rejected the Petitioners' argument and specifically found that selection of a forum does satisfy the reliance requirement. *McCool*, 972 F.2d at 1459.

Just as the *McCool* plaintiffs relied on the selection of a forum (federal v. state), so did the *Majeski* plaintiffs (selecting the Seventh Circuit over the Ninth Circuit), a move

the *Majeski* plaintiffs "presumably would not have made had they anticipated their federal claims would be time-barred" under Seventh Circuit law. *McCool*, 972 F.2d at 1459. The controlling concern in *McCool*, as in the *Chevron Oil* decision it follows, is whether inequity results from retroactive application of a shortened limitations period to an action that was timely when commenced. The inequity is as great whether the reliance is in choosing where *or* when to file.

Petitioners argue that "every plaintiff could say 'If I had known what the future would bring in this jurisdiction, I would have sued somewhere else'." Petition at 14. Not every §10(b) plaintiff had a choice of forums; but if one did, making the choice may have involved detrimental reliance. The reliance admitted by the petitioners as sufficing is subject to the same comment: while not every §10(b) plaintiff had the option of delaying the filing under the then prevailing limitations period, those that had the option and did delay, can say: "If I had known what the future would bring in this jurisdiction, I would have filed earlier."

The Seventh Circuit clearly followed its *own* well-established principles of retroactivity. There is no reason for this Court to review its ruling.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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